UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

200 EAST 81ST RESTAURANT CORP.
d/b/a BEYOGLU

and **Case No. 02-CA-115871**

MARJAN ARSOVSKI, an Individual

Simon-Jon H. Koike, Esq., Counsel for the General Counsel
Jessica N. Tischler, Esq. and *Mark D. Lebow, Esq*., Counsel for the Charging Party
Gail Weiner, Esq., Counsel for the Respondent

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in New York, New York on March 10, 2014. The charge in this case was filed on October 29, 2013. The Complaint which issued on December 18, 2013 and alleged that on or about June 25, 2013, the Respondent discharged Marjan Arsovski because he, in concert with other employees, filed a lawsuit alleging violations of the Fair Labor Standards Act and the New York Labor Law.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings and Conclusions

I. Jurisdiction

The Respondent is a retail establishment which, during the calendar year ending November 13, 2013, derived gross revenue in excess of $500,000 and purchased and received at its New York place of business, goods and supplies valued in excess of $5000 directly from points located outside the State of New York. I therefore find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act. *Carolina Supplies & Cement Co*., 122 NLRB 88 (1959).

II. Alleged Unfair Labor Practices

The Respondent is a restaurant on the upper east side of Manhattan. The owner is Julian Betulovici, who in part for medical reasons, spends a large part of the year outside of

[1] The General Counsel's unopposed Motion to correct the record is granted.

New York. At the time of the events herein, the General Manager was Josip Raspudic, who in May 2013 had replaced Alexander Georghiou. It is admitted that Raspudic is a supervisor within the meaning of Section 2(11) of the Act. The evidence shows that Raspudic is the person who supervises the restaurant's non-cooking staff. The evidence further shows that because Betulovici is away for a good part of the year, Raspudic is the main person who runs the restaurant, albeit he and Betulovici are in daily contact with each other, either by phone or email when the latter is either in Poland or Florida.

Also at around the same time period, Anna Urgureanu was hired to be the new bookkeeper. In this regard, she replaced Marta Sikora, a long term employee, who had resigned in December 2012 or January 2013 and moved to California. It is conceded that Urgureanu was also a supervisor within the meaning of the Act. However, her main job was to account for and register the daily receipts and expenditures for the restaurant.

The Charging Party, Arsovski, was one of about 8 to 10 waiters who worked at the restaurant. As a waiter, a substantial proportion of his income was based on tips; mainly obtained from credit cards payments.

At the time of these events, Arsovski was having an affair with Urgureanu. Since she was the bookkeeper and therefore the person who was responsible for tallying up the income each day and figuring out what tips should go to what person, this could theoretically give rise to a problem because she would be in a position to juggle the records so that Arsovski would be able to obtain more in tips than he was entitled to. There is however, no evidence in this case that this occurred.

Some time between May 20 and May 23, Urgureanu gave notice of her intention to resign. This was communicated to Betulovici who was in Poland at the time and he asked Marta Sikora to return to the bookkeeping position until he could find a replacement. She agreed.

According to Betulovici, after Sikora returned in late May, she informed him that Arsovski was having an affair with Urgureanu and that Arsovski's personnel filed was missing. She also told him that a notebook containing a record of receipts and payments was missing. Betulovici testified that when he found out what was going on between Arsovski and Urgureanu, he phoned Raspudic on May 25 and told him to fire Arsovski.

Despite the claim by Betulovici that he decided to terminate Arsovski on May 25 because of his inappropriate relationship with Urgureanu and the missing records, this did not, in fact, occur. Raspudic did not tell Arsovski that he was being terminated and Arsovski continued to work without incident until June 25, 2013.

Arsovski testified that in May and June he spoke to a few of the other waiters about wages. He also testified that he told another employee named Burak Sunar that he was going to file a lawsuit. According to Arsovski, he asked Sunar to join in the lawsuit, but Sunar refused. [2]

On June 20, 2013, Arsovski, through legal counsel, filed a lawsuit in the U.S. District Court which alleged certain violations of the Fair Labor Standards Act. At paragraphs 10 of the

[2] This employee was not called as a witness.

Complaint, it states that it is brought by "Plaintiff on behalf of himself and similarly situated persons who are current and former tipped employees…, who elect to opt in to this action…" At paragraph 11, it states that the "FLSA Collective consists of approximately 40 similarly situated current and former employees of Beyoglu, who over the last three years, have been victims of Defendants' common policy and practices that have violated their rights under the FLSA, by, inter alia, willfully denying them overtime wages."

Notwithstanding the Complaint's assertion that Arsovski was acting on behalf of other similarly situated or affected employees, he did not obtain any kind of authorizations from any present or past employee to file this lawsuit. That is, if he was acting on their behalf, he was doing so without their prior authorization.

The Complaint was served on the Respondent on the morning of June 25, 2013. This then generated a series of phone calls between Betulovici, Raspudic and Sikora about the lawsuit. (Betulovici was still in Poland). Also on this morning, Sikora opened a letter from Arsovski's lawyer and apparently after communicating its contents to Betulovici, had a phone conversation with Arsovski where she told him that they were "shocked" at Arsovski's actions.

As Arsovski was scheduled to work the dinner shift on June 25, he arrived at the restaurant in the afternoon. When he arrived he saw that his name was not on the work schedule. Thereafter, he, Raspudic and Sikora went upstairs to have a chat. According to Arsovski, Raspudic told him that the company had received a letter from his lawyer and that from that point on, the parties would communicate only through their lawyers. When Arsovski asked why had been removed from the schedule, Raspudic stated that Betulovici had told him that he didn't want Arsovski at the restaurant until he returned from his vacation. (He was scheduled to return in two weeks). According to Arsovski, when he again asked why he was being removed from the schedule, Raspudic said; "Well, you're filing a lawsuit. What do you expect? To work?" Arsovski also testified that Raspudic said that Betulovici was "done with him."

Arsovski's account of this meeting was largely corroborated by Raspudic who testified as follows:

> Q. Okay. So the three of you walk upstairs and then how does it begin? I mean
> A. I start the conversation. I said okay, listen, we have this lawsuit here we got in the restaurant. I don't know what is it about, honestly, but I spoke to Julian about it. He don't want you in the restaurant right now. He's going to deal with this when he comes back.
> Q. Okay. Did he say he – did you tell him that Mr. Betulovici was done with Mario? Did –
> A. I don't remember.
> Q. Okay. And so did you tell Mario that the owner had removed him from the schedule because he was filing a lawsuit?
> Judge Green: Use those words?
> The Witness: I don't remember if I used those words.
> By Mr. Koike:
> Q. But that was the spirit?
> A. Probably that was the spirit. That was not the reason why he's getting fired – why he got fired.
> Q. Oh, so did he get fired?
> A. Sir that was not the reason why he got fired.
> Q. Okay. What was the reason why he got fired?

A. He was engaged in a personal relationship with the bookkeeper.
Q. Okay. Well, did you mention this during this meeting with Mister –
A. Not at this meeting, no. I mention it before that.
Q. You mentioned it before that with Mario?
A. When Anna was resigning we had this little drama incident in the restaurant. The owner discovered that they were in a relationship. He wanted him to be fired. He told me that over the phone.
Judge Green: But that sound like its back in May.
The Witness: That's back before this lawsuit, yes.

After the meeting described above, Arsovski went home. Betulovici returned at some point in early July. At no time, did any one contact Arsovski and tell him that he could return to work. In my opinion, Arsovski was, in fact fired, even if those or similar words were not used on June 25, 2013. [3] Indeed, the Respondent's Brief admits that Arsovski was terminated.

Analysis

I have no doubt and conclude that Arsovski was fired because he filed an FLSA lawsuit that was received by the Respondent on the morning of June 25, 2013; the very day that his employment was terminated. I reject the contention that he was discharged for any prior misconduct relating to his affair with the former bookkeeper or with her alleged taking of certain records from the restaurant. The Respondent's owner became aware of those situations a month before June 25, but Arsovski remained employed. Indeed he continued to work, clearly with the knowledge of Betulovici, who was in daily contact with Raspudic after he allegedly told Raspudic to fire Arsovski on May 25. Thus, whatever transgressions may have occurred in May 2013, it is clear to me that these were not deemed by the Respondent to be sufficient reasons to fire Arsovski *until he filed his lawsuit*. [4]

The legal question here is whether in filing the FLSA lawsuit relating to wages, Arsovski was engaged in concerted activity within the meaning of Section 7 of the Act. Or was he acting solely in pursuit of his own interests?

The General Counsel cites the Board's decision in *D.R. Horton Inc.*, 357 NLRB No. 184 (2012). However, the holding of that case did not involve a situation like this. Rather, the actual holding in Horton was that an employer violated Section 8(a)(1) when it compelled its employees, as a condition of hire, to sign an agreement that "precluded them from filing joint, class, or collective claims addressing their wages, hours or other working conditions … in any forum, arbitral or judicial." Nevertheless, the General Counsel relies on that portion of the decision that states:

> To be protected by Section 7, activity must be concerted, or "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 281 NLRB 882, 885 (1986), affd. sub

[3] In order for a discharge be found, it is not necessary that the words, "discharged" "fired" or "laid off" be used. The test is whether an employer's statements would reasonably lead an employee to believe that he had been discharged. *Dublin Town Ltd*., 282 NLRB 307, 308 (1986).

[4] The issue here is whether the employer discriminated against Arsovski because he filed a lawsuit challenging certain of the Respondent's wage and hour policies. I have no opinion and make no conclusions as to the merits of any claims or counterclaims in that lawsuit.

> nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). When multiple named-employee plaintiffs initiate the action, their activity is clearly concerted. In addition, the Board has long held that concerted activity includes conduct by a single employee if he or she "seek[s] to initiate or to induce or to prepare for group action." *Meyers*, supra at 887. Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.

Clearly, the evidence in this case does not establish that Arsovski acted in concert with, or on the authority of any of the other employees. His lawsuit was not filed with their consent, or except perhaps in one case, even with their knowledge. On the other hand, his Complaint does allege that it was filed on behalf of a class of similarly situated employees who work or have worked at the Respondent over a three year period of time. In this regard, it could be argued that Arsovski sought "to initiate or to induce or to prepare for group action."

Moreover, I think that it is reasonable to conclude that when the FLSA Complaint was received and read, the Respondent believed or at least suspected that Arsovski was engaged in concerted group action. This is because the document states, clearly and unequivocally, that it represents an action on behalf of a class of present and former employees. Therefore, if Arsovski was discharged because the employer believed or suspected that he was engaged in concerted activity that would be sufficient to find a violation of the Act. Thus, when a discharge is motivated by the employer's belief or suspicion that the employee is engaged in conduct that is protected by the Act, the discharge would be deemed unlawful, even if that belief was mistaken. *NLRB v. Scrivener*, 415 U.S. 117 (1972); *Trayco of S.C.*, 297 NLRB 630 (1990).

On these findings of fact and on the entire record, I issue the following conclusions and recommended [5]

Conclusions of Law

The Respondent, 200 East 81st Restaurant Corp., d/b/a Beyoglu, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities, including the filing of a lawsuit regarding the wages of themselves and other employees.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, offer Marjan Arsovski full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Arsovski whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this Decision

(c) Reimburse Arsovski an amount equal to the difference in taxes owed upon receipt of a lump sum backpay payment and taxes that would have been owed had there been no discrimination against him.

(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Arsovski it will be allocated to the appropriate periods.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful action against Arsovski and within three days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in New York, copies of the attached notices marked "Appendix." [6] Copies of the notices, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 25, 2013.

Dated, Washington, D.C. April 29, 2014

_____

Raymond P. Green
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because they engage in protected concerted activities including filing lawsuits on behalf of themselves and others relating to their wages or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer Marjan Arsovski full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make the above named employee whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful actions against Arsovski and within three days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.

200 East 81st Restaurant Corp. d/b/a Beyoglu
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-115871 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.